

2010 WL 2157994 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Troy RUTMAN, Personal Representative of the Estate of Elaine Rutman, on behalf of the Estate of Elaine Rutman, deceased; and Troy Rutman, individually and on behalf of, Elaine Rutman's statutory beneficiaries pursuant to A.R.S. section 12-612 (A), Plaintiff,

v.

AVALON CARE CENTER-CHANDLER, L.L.C., dba Chandler Health Care Center; Avalon Health Care of Arizona, L.L.C., a Utah limited liability company; Avalon Health Care Centers, L.L.C., a Utah limited liability company; Avalon Health Care Management of Arizona, L.L.C., a Utah limited liability company; Heritage Management, Inc., a Utah corporation; Avalon Health Care, Inc., a Utah corporation; Todd Corless, Administrator and John Does 1-200, Defendants.

No. CV2008-027385.
April 13, 2010.

Plaintiff's Response to Defendants' Motion for Summary Judgment Re: Administrator Todd Corless

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Assigned to: The Hon. [Edward Burke](#).

(ORAL ARGUMENT REQUESTED)

(COURT REPORTER REQUESTED)

Troy Rutman, personal representative of the estate of Elaine Rutman on behalf of the estate of Elaine Rutman, hereby responds to Defendants Avalon and Corless' Motion for Summary Judgment. Plaintiff's response is supported by the following memorandum of points and authorities and by the separate statement of facts. For the reasons discussed herein, the Court should deny Defendants' motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE ISSUE.

Defendants argue that Todd Corless should be dismissed from this action for two reasons. First, Defendants contend that Plaintiff's experts have no opinions with respect to Mr. Corless' negligence. Second, Defendants argue that even if Plaintiff's experts opine that Mr. Corless was negligent, there is insufficient evidence to support a finding of direct or vicarious liability. Plaintiff disagrees.

A. Mr. Corless is Not Entitled to Summary Judgment Because Plaintiff's Claim Against Todd Corless Is Not a Medical Malpractice Action requiring Compliance with [A.R.S. § 12-2604](#).

In *Estate of McGill v. Albrecht*, 203 Ariz. 525, 57 P.3d 384 (2002) the Supreme Court of Arizona granted review by special action of a matter involving an action against two doctors and the behavioral health facilities and service providers by the estate of a sixty-four year old woman who died as a result of cardiac arrest due to neurotoxicity and other causes. Plaintiffs brought a lawsuit against the doctors and the service providers alleging negligence, abuse and neglect under both the MMA and the APSA. The trial court granted defendants' motion for summary judgment and dismissed the APSA claims, leaving only the medical malpractice claims for trial. The Court of Appeals declined jurisdiction to hear the special action, and so the Arizona Supreme Court, noting the issue to be one of first impression and statewide importance, granted review. *Id.*

Similar to the instant case, in the case of *Estate of McGill*, a vulnerable adult was placed in the care of the defendants. As a result of the relationship between caregiver and caretaker, the plaintiffs alleged that she was negligently medicated and that this negligence, constituting abuse and neglect as those terms are defined in the APSA, resulted in her death. *Id.* In the instant case, Mrs. Rutman was a dependent and vulnerable adult who required assistance with all of his activities of daily living. PSOF ¶¶ 7-9. It is alleged that as a result of the neglect and abuse of her caretakers, Mrs. Rutman suffered from a fall and two fractures which led to her death. PSOF ¶¶ 11, 13, 14, 87, 106, 121, 125, 134, 135, 137, 138, 142, 145, 147, 231.

The *McGill* court held that plaintiffs could proceed to trial on their APSA claims. That court's reasoning informs the decision in the instant case that this is not a medical malpractice case. First, the court observed that the APSA, adopted in 1989, created a statutory civil cause of action with the legislative purpose of protecting Arizona's elderly population. *Id.* at 528, 387. Citing *Denton v. Superior Court*, 190 Ariz. 152, 156 (1997) the court observed that the statute was intended to increase the remedies available to and for elderly or vulnerable people who had been harmed by their caregivers *Id.*

Estate of McGill held that it could neither automatically limit the negligent act or omission wording of A.R.S. §46-451(A)(1) "to a series of negligent acts nor say that a single act of negligence involving an incapacitated person will never give rise to an APSA action", and that "to be actionable abuse under APSA, the negligent act or acts (1) must arise from the relationship of caregiver and recipient, (2) must be closely connected to that relationship, (3) must be linked to the service the caregiver undertook because of the recipient's incapacity, and (4) must be related to the problem or problems that caused the incapacity." *Id.* at 530, 389.

A.R.S. §46-455 is entitled "Permitting life or health of an incapacitated or vulnerable adult to be endangered by neglect; violation; classification; civil remedy; definition." Section A refers to "a person who has been employed to provide care." Section B permits the filing of an action in superior court "against any person or enterprise that has been employed to provide care..." Section O states: "A civil action authorized by this section is remedial and not punitive and does not limit and is **not limited by any other civil remedy or criminal action or any other provision of the law.** Civil remedies provided under this title are supplemental and not mutually exclusive." A.R.S. §46-455.

The APSA was designed to protect vulnerable and elderly adults from their care custodians. More often than not, these care custodians were providing or promised to provide some level of nursing or medical care to those in their care. If the MMA eliminated the ability for these adults to proceed against these care custodians in situations where any medical care or nursing care was being provided, there would be virtually no one who could ever file an action based upon APSA. As the *McGill* court pointed out, if the MMA were the exclusive remedy in a situation such as the instant case, "the great majority of caregivers to the incapacitated would be immune from APSA actions and APSA would be a toothless tiger." *Estate of McGill, supra*, at 530, 389.

Other jurisdictions agree that where the gravamen of the action is elder or vulnerable adult abuse, the procedural requirements for professional negligence causes of action give way to the procedural requirements for that state's elder and vulnerable adult protection statutes. *Country Villa v. Superior Court*, 120 Cal. App. 4th 426 (2004), (procedural statute for punitive damages claim in professional negligence against health care provider did not apply to this action); *Integrated Health Care Services, Inc. v. Redway*, 840 So. 2d 974 (2003), (Complaint that nursing home violated its statutory duty to provide adequate and appropriate health care to resident did not plead a medical malpractice cause of action against a healthcare provider, and thus Plaintiff was not required to comply with statutory presuit requirements for filing a medical malpractice action.)

Here, Defendants were persons who were employed to provide care to Mrs. Rutman, a vulnerable adult. The instant lawsuit was filed pursuant to [A.R.S. §46-455\(B\)](#) against those persons. Additionally, pursuant to [A.R.S. §46-455\(0\)](#) medical malpractice actions and APSA civil actions are not and cannot be mutually exclusive. APSA, which was enacted subsequent to the 1976 enactment of the MMA provides a supplement to the [MMA. *Estate of McGill*, 203 Ariz. 525, 531, 57 P.3d 384, 390 \(2002\).](#)

The Defendants in this matter want a ruling by this court that the medical malpractice rules apply to this litigation, requiring an application of [A.R.S. §12-2604](#) to Dr. Dupee and Ms. Camicia's qualifications; this ruling would be contrary to the intent and specific language of the APSA statute, wherein a civil action under this statute shall not be limited by any other civil remedy or any other provision of law.

B. The Duties and Responsibilities of an Administrator Do Not Require Expert Testimony.

Defendants argue that Plaintiff seeks to hold Mr. Corless vicariously liable for the acts and/or omissions of the Chandler Health Care Center nursing staff; this is incorrect. Plaintiff seeks to hold Mr. Corless liable for her failure to meet his duties and obligations as the Administrator of Chandler Health Care Center and for allowing Mr. Steffy's health to be endangered by neglect or **abuse**. Defendants argue that the duties and responsibilities of an Administrator in a long-term nursing facility must be explained to a jury by a qualified expert, citing both [Arizona Rules of Evidence, Rule 702](#) and [A.R.S. §12-2604](#); Plaintiff disagrees.

The duties and responsibilities of an Administrator in a long-term care facility, such as Chandler Health Care Center, are clearly defined in both Federal and State regulations. For example, an Administrator of a long-term care facility, such as Chandler Health Care Center, must be licensed by the State, must ensure that there is adequate staff to provide for the needs of the residents, must appoint a director of nursing, must ensure staff's competency, must ensure that medications are available and properly stored and administered, must investigate and report allegations of **abuse** or neglect, and must establish and implement policies and procedures for the facility. PSOF ¶167.

Plaintiff's nursing expert determined that Mr. Corless failed to discharge his duties as an administrator as required by the Arizona Administrative Code. Those opinions are described in the Affidavit of Plaintiffs nursing expert, Michelle Camicia. Ms. Carmicia has stated that, according to the Arizona Administrative Code, an administrator shall ensure that a resident is free from **abuse** and shall ensure that nursing services are provided 24 hours a day. Furthermore, an administrator shall ensure that nursing care institution policies and procedures are established, documented, and implemented that cover resident rights, **abuse** of residents and nursing services. Ms. Carmicia has opined that the administrator of Chandler Health Care Center failed to ensure that Elaine Rutman's resident rights were protected and that she be free from **abuse** and neglect. *See* Plaintiffs SOF at ¶ 167.

Defendants' second argument also must fail. Because an agent for a disclosed principal can be held personally liable for his own tortious actions committed within the scope of his employment, Plaintiff has a viable cause of action against Defendant Corless. Moreover, because Arizona law permits the administrator of a nursing home to be a named defendant for his failure to meet his statutory obligations, Mr. Rutman is entitled to pursue the instant claims against Defendant Corless individually.

II. TODD CORLESS IS A PROPER DEFENDANT.

a. Plaintiff has an Independent Cause of Action Against Defendant Corless

[A.R.S. section 46-455 \(B\)](#), *Arizona's Adult Protective Services Act* ("APSA"), permits "an incapacitated or vulnerable adult whose life or health is being or has been endangered or injured by neglect, **abuse** or exploitation" to file a lawsuit "against any person or enterprise that has been employed to provide care, that has a legal duty to provide care or that has been appointed by a court to provide care...." In other words, the APSA permits Plaintiff to file a lawsuit for **abuse** and neglect against the administrator of Chandler Health Care Center, Todd Corless.

But the APSA is not the only source of Plaintiff's cause of action against Defendant Corless. Relevant *Arizona Administrative Code* sections charged Mr. Corless with the personal duty to supervise the care of the residents in his facility: "An administrator shall: 1) Be responsible to the governing authority for the operation of the nursing home institution; 2) Have the authority and responsibility to administer the nursing care institution..." Section R9-10-904(D).

The Code also tasked Defendant Corless with a duty to supervise his employees; Specifically, an administrator is responsible for ensuring that the staff he hires and supervises adequately discharges their duties: "[an administrator] shall ensure that a staff member who provides direct care is available to meet the needs of the resident based on the resident's comprehensive assessment" and that a direct care giver "demonstrate and maintain competency and proficiency according to criteria established in the nursing care policies and procedures." Section R9-10-905. Additionally, Defendant Corless was required to ensure that nursing services were available 24 hours a day in a number sufficient to meet the needs of the residents and also that the director of nursing participated in a quality management program. Section R9-10-906.

As the regulations illustrate, with authority comes responsibility. With the failure to fulfill these responsibilities, comes Plaintiff's claim for negligence against Defendant Corless. Based upon the APSA and relevant administrative regulations, Defendant Corless is personally liable for **abuse** and neglect of Elaine Rutman at the facility he supervised and is therefore a proper defendant here.

b. Because Defendant Corless Is Independently Liable for His Own Negligence, He Is A Proper Defendant.

Defendants point the court to cases which hold that an employer is liable for the torts of an employee committed within the employee's course and scope of employment. Plaintiff does not dispute that is the holding of these cases. However, the plaintiffs in these cases, after demonstrating that an employee committed a tort, attempted to also hold the employer liable under the doctrine of respondeat superior. The purpose was to add, rather than to subtract, a defendant. Here, Defendants seek to reverse the doctrine in order to exclude Mr. Corless as a defendant.

In *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963), the court held that, in addition to the liability of employers under the doctrine of respondeat superior, liability also attaches to those employees who are guilty of individual tortious conduct. Thus, since Defendant Corless can be guilty of the torts alleged in the complaint in his role as administrator of Chandler Health Care Center during Ms. Rutman's residency, he is a proper defendant whether or not his employer, the facility, is also liable based upon the doctrine.

There is no Arizona case that specifically discusses the doctrine as it applies to an administrator of a nursing home. However, cases from other jurisdictions are instructive. In *Arkansas State Board of Nursing v. Long*, 8 Ark. App. 288, 651 S.W.2d 109 (1983) the Arkansas Court of Appeals recognized that an administrator could be guilty of negligence and unprofessional conduct in authorizing her housekeeping staff to wax the floor leading to rooms containing twenty-four skilled care patients. In the Fifth Circuit opinion of *Gray v. Beverly-Enterprises-Mississippi, Inc.*, 390 F.3d 400 (5th Cir. 2004), the appellate court reversed the district court's order denying plaintiff's motion to remand, finding that "it is at least reasonable to expect that a Mississippi court might find that the allegations of the [administrator's] misfeasance and nonfeasance are sufficient to state a claim under state law."

Finally, the United States District Court for the Northern District of Mississippi more-recently addressed this issue in *McCracken v. Mariner Health Care, Inc.*, Slip Copy, 2005 WL 2877729 (N.D. Miss.) There, Defendants removed the action to federal court on the basis of federal diversity jurisdiction. Plaintiff moved to amend her complaint to add the administrator as a party defendant. Defendants alleged that Plaintiff should be precluded from making the amendment, because it served no purpose other than to defeat the court's diversity jurisdiction. The court held that because individual administrators of nursing home facilities are potentially liable for their own negligence, the amendment was proper.

Todd Corless is a Defendant in this case because, as administrator of Chandler Health Care Center, he is potentially liable to Ms. Rutman's estate and representatives for his tortious **abuse** and neglect of Ms. Rutman. He is a proper Defendant and should not be dismissed from this lawsuit.

III. CONCLUSION.

For all the foregoing reasons, Plaintiff respectfully requests that the instant motion be denied.

Dated: April 13th, 2010

WILKES & MCHUGH, P.A

By: /s/ *Richard J. Murphy*

Attorneys for Plaintiff

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